BRACEWELL

February 2, 2021

CONFIDENTIAL SETTLEMENT COMMUNICATION
SUBJECT TO FED. R. EVID. 408

Mr. Thomas P. Carroll,
Acting Director, Air Enforcement Division, Office of
Civil Enforcement
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W., 2201A
Washington, DC 20460

Dear Acting Director Carroll:

I write on behalf of Denka Performance Elastomer LLC ("DPE") in response to your letter dated January 6, 2021, requesting certain information related to short-term chloroprene concentrations detected in connection with the operation of the experimental SPods deployed by EPA ("January 6 Request Letter"). DPE has carefully reviewed your request and writes to communicate several concerns associated with your letter.

DPE Voluntarily Achieved Significant Chloroprene Reductions: As you know, DPE has been a cooperative participant in efforts to reduce emissions from DPE's Pontchartrain Works site in LaPlace, Louisiana ("Pontchartrain Facility"). Following DPE's acquisition of the Pontchartrain Facility in November 2015, DPE voluntarily committed to implementing measures to reduce chloroprene emissions, including entry into an Administrative Order on Consent ("AOC") with the Louisiana Department of Environmental Quality ("LDEQ") to reduce chloroprene emissions by approximately 85%. Although EPA was not a signatory to the AOC, the Agency was aware of and participated in the negotiations preceding the execution of that document.

As part of the AOC, DPE committed to construct and install a Regenerative Thermal Oxidizer ("RTO") to achieve a 98% destruction removal efficiency on chloroprene emissions sources in the facility's Neoprene process unit. DPE timely met this commitment and, in March 2018, the RTO became fully operational. Separately, DPE has implemented a continuous improvement program to address chloroprene emission sources that were not part of the AOC. This program has already prompted at least 47 improvements, including process, equipment, and work practice changes.

EPA's Data Show Chloroprene Emissions Well Below Applicable Ambient Air Standards: These voluntary measures, including the installation of the RTO, have been successful in significantly reducing chloroprene emissions. As stated in EPA's November 2020 air monitoring summary report, DPE has achieved an emission reduction of approximately 85% compared to 2014 levels.

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> Since March 2018, air sampling results have shown a substantial reduction in chloroprene emissions at all monitoring locations. The last of the chloroprene emission control devices to become fully operational (in March 2018) was a Regenerative Thermal Oxidizer (RTO). The latest annual chloroprene emissions inventory data reported by Denka Performance Elastomer LLC, based on 2019 data, reflect an emission reduction of 85% compared to 2014 emissions inventory data.[1]

LDEQ has also recognized DPE's emission reductions at the Pontchartrain Facility and, in May 2020, confirmed that the reductions satisfied the applicable requirement of the AOC:

> On or about May 19, 2020, LDEQ compared the emissions data reported in the Emissions Reporting and Inventory Center (ERIC) and has determined that an 85% (84.63% rounded) reduction in chloroprene emissions was achieved from the 2014 reported emissions. Please be advised this reduction satisfies the requirement of Paragraph V of AE-AOC-17-00011.[2]

The ambient air standard for chloroprene applicable to the Pontchartrain Facility is the LDEQ Ambient Air Standard Requirement ("LDEQ Chloroprene Air Quality Standard"), which is set at 857 $\mu g/m^3$ based on an 8-hour average.[3] EPA's monitoring data has never suggested a release of emissions above or even approaching this standard.

DPE's Voluntary Agreement to Provide Confidential "Spike" Investigations Was Limited to EPA's Community Monitoring Program and DPE's Own Sampling: In 2016, DPE and EPA both began monitoring ambient air concentrations of chloroprene at 6 off-site locations surrounding the Pontchartrain Facility. Monitoring results from both programs were published on public websites. EPA's program (the "EPA Community Monitoring Program") began in May 2016, providing for 24-hour samples to be collected at regular intervals (i.e., initially 3-day intervals, which changed to 6-day intervals in 2019). In March 2019, DPE presented to EPA a detailed root cause analysis explaining increasingly rare temporary elevations in certain detected chloroprene concentrations, referred to by EPA as "spikes," as well as activities taken by DPE to address such increases. In April 2019, DPE agreed to share certain information with EPA enforcement officials relevant to understanding causation when either party detected a chloroprene concentration value that exceeded 15 $\mu g/m^3$ on a 24-hour basis ("Spike Reports"). The 15 $\mu g/m^3$ threshold for Spike Reports was agreed to by DPE despite the threshold representing less than 2% of the LDEQ Chloroprene Air Quality Standard, the only legal standard applicable to ambient air concentrations of chloroprene. OECA, EPA's enforcement office, requested a "Standard Information Regarding Community

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[1] EPA, *ADDENDUM TO SUMMARY REPORT Air Monitoring for Chloroprene Concentrations in LaPlace, LA from May 25, 2016 through September 26, 2020* (Nov. 2020), *available at* https://www.epa.gov/sites/production/files/2020-11/documents/addendum-tp-summary-report-november-2020.pdf.

[2] Letter from Lourdes Iturralde, Assistant Sec'y, Louisiana Dep't of Env't Quality, to Patrick Walsh, Safety, Health, and Env't Manager, Denka Performance Elastomer, LLC (May 20, 2020).

[3] *See* LAC 33:III.5112, Table 51.2.

Monitoring Spikes" with a bolded header expressly indicating that "**R6 Enforcement will handle all requests and submittals of information to maintain Settlement Confidential protection under FRE 408.**" DPE provided Spike Reports to EPA's enforcement officials pursuant to the commitment from EPA that the reports would be treated as confidential settlement communications.

EPA's Continuous Air Monitoring Program Using Experimental SPods is Separate and Unrelated to DPE's Prior Commitments: EPA concluded its Community Monitoring Program in September, 2020 and has since implemented a separate "Continuous Air Monitoring Program," which uses experimental SPods. The SPod photoionization detector ("PID") was designed to continuously monitor the total volatile organic compounds ("VOCs") in the ambient air and trigger the collection of a canister air sample when VOC concentrations exceed a certain threshold. The collected air sample is subsequently measured for its chloroprene level. DPE has communicated its concerns with the accuracy and reliability of the data generated by the experimental SPods. DPE has also communicated its concern that publishing data only for those instances when the SPod PIDs are triggered could present unrepresentative information to the public. EPA implemented the Continuous Monitoring Program notwithstanding these concerns.

Notwithstanding these concerns, it bears noting that, according to letters from Ken McQueen, Regional Administrator, to Dr. Chuck Carr Brown, LDEQ Secretary and to Jaclyn Hotard, St. John the Baptist Parish President, dated December 16, 2020, the Initial Phase of EPA Continuous Air Monitoring Program resulted in the collection of 55 samples with an overall chloroprene average of 0.408 ug/m^3. And, as of October 29, 2020, the Operational Phase of the project resulted in the collection of 30 samples with an overall chloroprene average of 2.450 ug/m^3. Notably, these "average" values do not (and cannot) account for the chloroprene concentration values for periods when the PID is *not* triggered. If these lower values were factored into the calculation (like they were under the EPA Community Monitoring Program and continue to be under the DPE monitoring program), then the true averages would be substantially lower. Still, while the design of the data collection inevitably skews the data to represent only increased periods of emissions, these increased periods still show chloroprene emissions well below applicable ambient air quality standards.

Although DPE agreed to provide Spike Reports in connection with the EPA Community Monitoring Program, DPE and EPA never discussed nor agreed to DPE's preparation or transmittal of analogous information in connection with EPA's more recent Continuous Air Monitoring Program. The April 2019 agreement with EPA's enforcement office was specifically limited to EPA's Community Monitoring Program and did not contemplate that a similar arrangement would apply with respect to data derived from experimental SPods or other monitoring programs.

DPE's Specific Concerns Regarding the Reports Requested: DPE has significant concerns associated with the information requested in the January 6 Request Letter.

- **The letter lacks any assurance that the information will be treated as confidential by EPA.** DPE participated in a teleconference with EPA attorneys from the Office of Enforcement and Compliance Assurance and Region 6 on January 6, 2021. During that teleconference, EPA stated

that the information provided pursuant to the January 6 Request Letter would not be kept confidential and would be considered publicly available. This position would constitute an important departure from EPA's treatment of the Spike Reports previously provided by DPE. As noted above, EPA requested those Spike Reports pursuant to an express commitment that it would "handle all requests and submittals of information to maintain Settlement Confidential protection under FRE 408."[4] This commitment reflected the fact that DPE keeps information relating to operational and maintenance activities conducted at the Pontchartrain Facility closely held and does not make such information publicly available. Moreover, certain information requested by EPA (such as the likely source contributing to a "spike" in emissions) relies on the engineering judgement of DPE personnel. Among other reasons, DPE does not make such information public because it is subject to revision based on updated information. The information requested by EPA is a snapshot in DPE's current analysis, but it could be misleading to communicate it to the public as "data." DPE is very reluctant to share its confidential information without continued assurances that EPA will not publicly disclose the submissions or otherwise share the information. EPA, of course, remains able to share its SPod data as it thinks appropriate.

- **The letter requests information based on unreasonably low chloroprene concentration values.** The January 6 Request Letter seeks information based on four chloroprene concentration values between 10.7 and 15.1 $\mu g/m^3$. These concentration values are not probative of DPE's compliance with any applicable legal emission standard or limitation. As noted above, the only legal standard applicable to ambient air concentrations of chloroprene is the LDEQ Chloroprene Air Quality Standard, which sets a standard of 857 $\mu g/m^3$ based on an 8-hour average.

- **EPA's request threatens to impose a significant burden on DPE operations going forward.** DPE does not generate the requested information or records in the ordinary course of its business or to comply with applicable law and regulations. Since April 2019, DPE has confidentially transmitted 21 Spike Reports to OECA and addressed follow-up questions from EPA's enforcement office. The preparation of each report requires a significant effort from DPE to gather the pertinent data, to draft the report, and to conduct the appropriate internal review. Moreover, this burden increases as the concentration value that DPE is asked to describe decreases, and it becomes more difficult to identify the precise source contributing to that concentration value. Thus, DPE is concerned that the information requested in the January 6 Request Letter, as well as similar future requests, threatens to impose a significant burden on DPE.

  Moreover, DPE is unable to evaluate the *aggregate* burden associated with EPA's use of a lower threshold until after the data gathering is completed. The January 6 Request Letter lacks any

[4] *See Standardizing Information Collection from DPE to EPA Following a Community Monitoring Spike,* transmitted from Providence Spina, Attorney-Advisor, EPA to Robert Holden, Counsel to DPE (Mar. 11, 2019).

justification for why EPA would think the lower threshold is justified for this or future information requests.

- **The letter references chloroprene concentration values that deviate from DPE's monitoring records and have been collected from canister samples that may not be handled correctly.** The chloroprene concentration values cited in the letter are based on the SPod data collected in EPA's Continuous Air Monitoring Program. DPE remains concerned with the reliability and accuracy of the data from canisters associated with the SPods. The canisters are associated with the experimental SPods, and are designed to be triggered automatically by the SPod. Notably, the canisters associated with the experimental SPods required manual activation in several of the instances where EPA is requesting additional information from DPE because the PID did not trigger a sampling event. DPE is concerned that the canister sample results may not be accurate or representative of the true chloroprene concentrations in the air around the sampler.

  Since implementing the experimental SPod program, EPA has provided no indication to DPE concerning how the data is validated, but DPE notes that 2 of the 4 chloroprene concentration values cited in the January 6 Request Letter are inconsistent with the data collected through DPE's monitoring program. And, likewise, 3 of the 4 chloroprene values were generated only after the canisters were manually triggered. These departures deviate from the high level of consistency between DPE's program and EPA's previous Community Monitoring Program. In EPA's September 2020 monitoring report, EPA stated that "the chloroprene air sampling results from both the EPA [Community Monitoring Program] and DPE air monitoring networks are well correlated." That does not appear to be the case with the canisters associated with the SPods and it is unclear what EPA has done to assess the validity of the data it has gathered. Given the large proportion of inconsistencies thus far, DPE is reluctant to agree to gather information, compile data, and review reports based on chloroprene concentration values measured through the SPod program.

DPE appreciates the working relationship it shares with EPA. DPE intends to continue to partner with the agency and to work to reduce chloroprene through feasible and pragmatic action. We would be pleased to meet by videoconference to discuss these matters further. Please feel free to contact me at your convenience.

Very truly yours,

Jason B. Hutt
Counsel to DPE

cc: Ms. Providence Spina
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